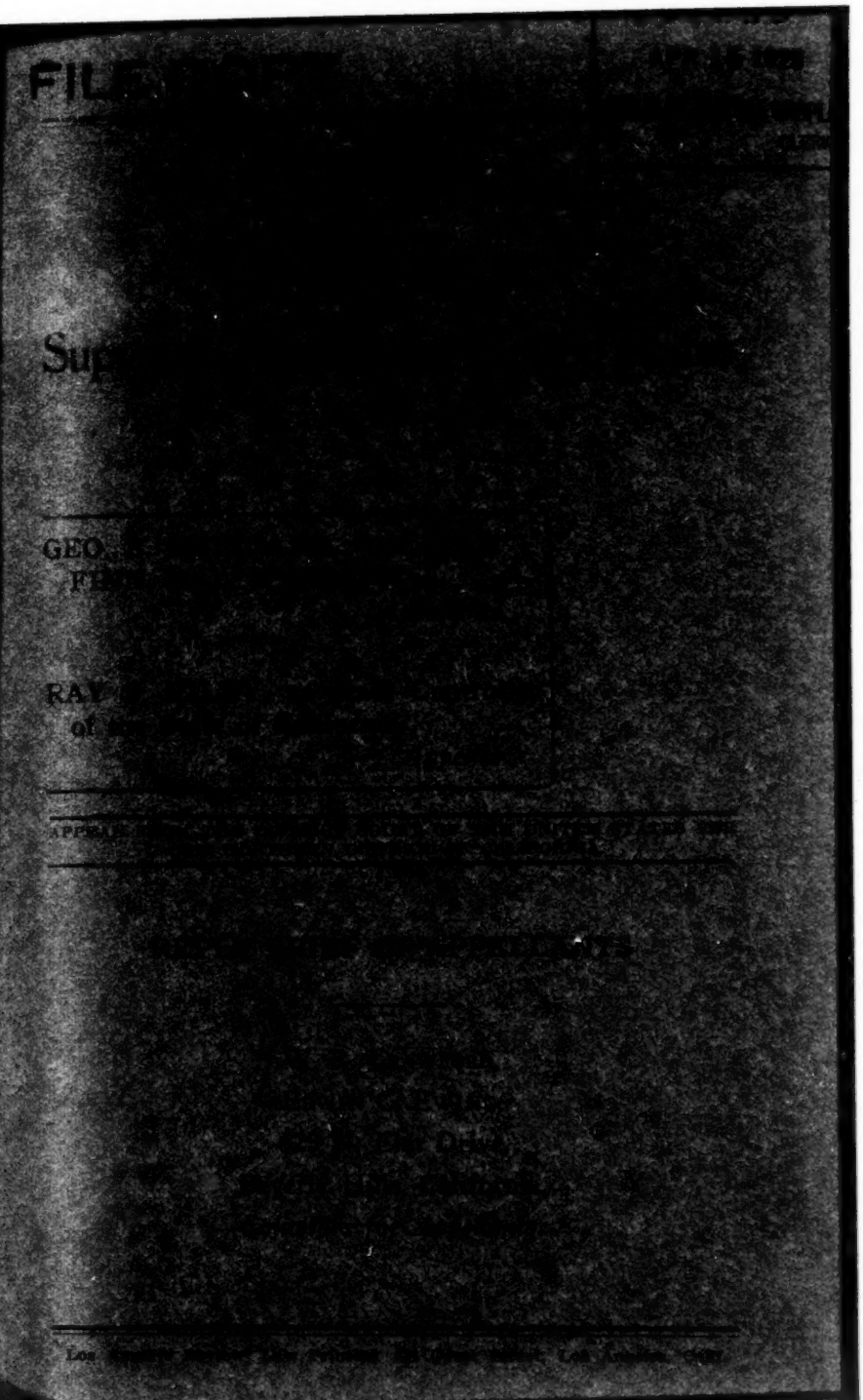

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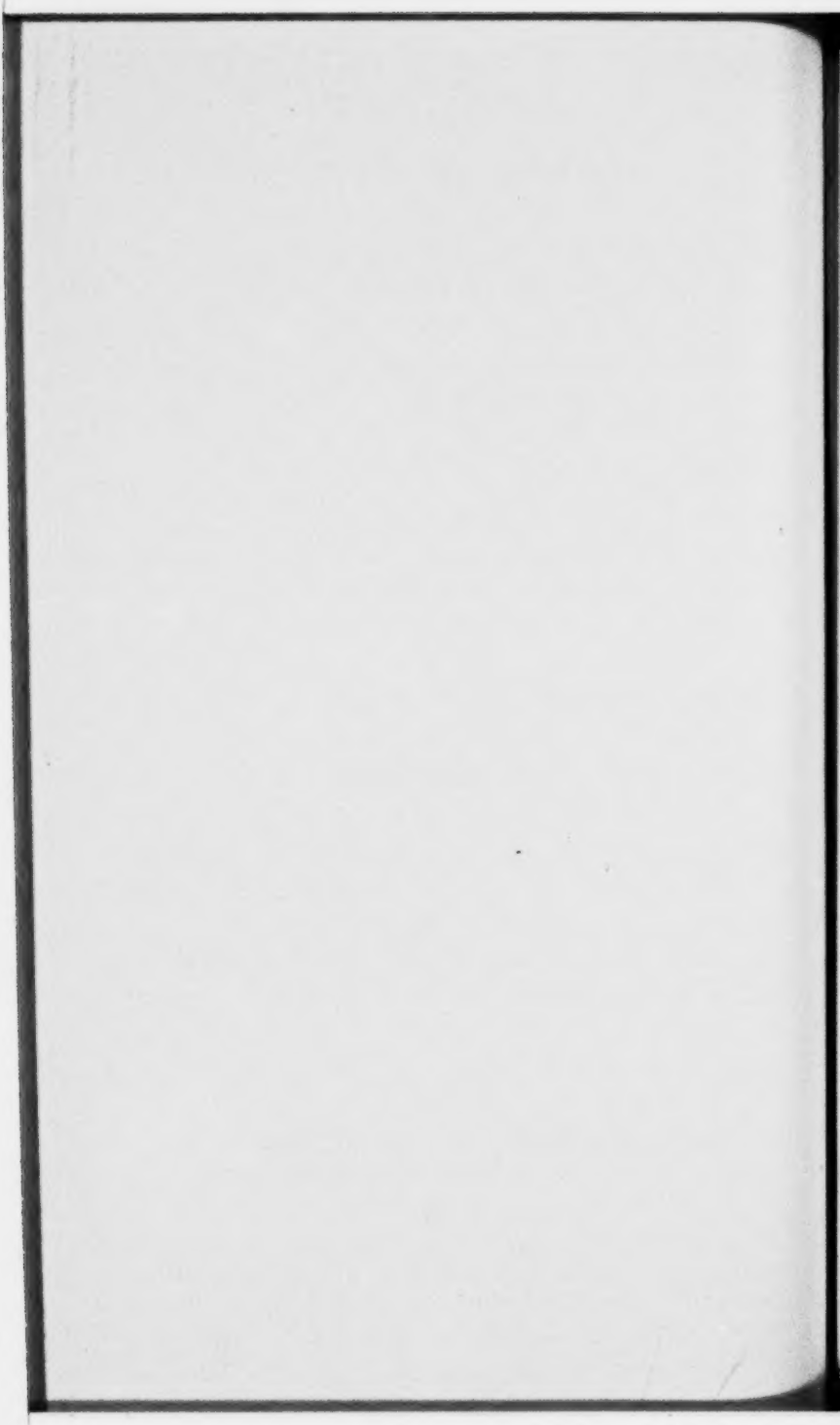

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

GEO. B. WILLIAMS, WILLIAM J. FINN, M. L. MYERS, et al.,
Appellants,

vs.

RAY S. RILEY, as State Controller of the State of California,
Appellee.

REPLY BRIEF OF APPELLANTS

Under the caption:

I.

"The California Highway System in General"

on page 5 of the appellee's brief, the appellee cites certain statutes and the Constitution of California. Prior to the adoption of the Rural Post Road Act of 1916 by the State in 1917, the State had issued $33,000,000.00 of bands for the acquisition and construction of a system of state highways and not a dollar of such amount was used on the streets of municipalities. After 1917, the state in 1919 adopted a state bond issue of $40,000,000 for the construction of certain additional state highways. Not a dollar went into streets of municipalities.

So that the state had constructed state highways by taxes.

The funds for constructing and maintaining highways are drawn from different sources, the one from travelers by a toll, the other from the community by a tax.

State v. Maine, 27 Conn. 691;
State v. New Boston, 11 N. H. 407;
People v. Jacobson, 79 Cal. 166;
Fishill v. Fishill etc. P. S. R. Co., 22 Barb. 634;
Carter v. Clark, 89 Ind. 238;
Walker v. Caywood, 31 N. Y. 51;
Douglas v. Boonsbough etc. Co., 22 Md. 219;
Callison v. Hedrick, 15 Gratt. 244;
Pauton, etc., Co. v. Bishop, 11 Vt. 190;
Comrs. of Dodge County v. Chandler, 6 Otto, 205, 24 L. Ed. 625.

In 1917 at the time the state had accepted the provisions of said Rural Post Road Act of 1916, the state had constructed the public highways outside of municipalities by the proceeds of bond issues. amounting to $33,000,000, and the state in 1919 desired to increase the Federal aid, so it issued the $40,000,000.

The Federal aid since 1917 had been used, not only for new construction, but also for the reconstruction of public highways, not only on state highways, but also on county roads all as provided by said Federal Act (R. 3, 4, 5).

In 1923, the state changed its method of raising money by bonds and enacted the Motor Vehicle Act of 1923, the Motor Vehicle Transportation License Act of 1923 and the Motor Vehicle Full Tax Act of 1923, and thereafter said Motor Vehicle Act and the Motor Fuel Act have been amended so to raise the charges, and the Transportation License Act has been repealed and the

Constitution has been amended by Section 15 of Article XIII, so as to take the place of said Transportation Act. We have been informed that the state will receive this year about $10,000,000 collected from the Motor Vehicle Act, and about $32,000,000 from the Motor Fuel Act (original brief, page 39), and the state will pay out from the Motor Vehicle Act about $2,000,000 for the entire cost of the regulating and administrating the Act, and the state will only pay out a few thousand dollars to collect the said $32,000,000.

The streets within municipalities are not constructed, improved or maintained by the State. (R. 6, 7, 8.)

Sec. 11 of Article XI of the *Constitution* provides:

> "The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

See *Bacon Service Corp. v. Huss,* 199 Cal. 21, cited in our brief, p. 29.

In our complaint we alleged that "All of the highways of the State of California are post roads, and the public highways of said state are covered by the said provisions of said Acts, aforesaid." (R. 3, 4.)

The appellee in his brief, pages 11 and 12, attacks the restrictions in the Federal Acts and says the "limited Federal aid" does not give much relief. The Grand Trunk Western Ry. Co. had the same desire to obtain benefits, but after obtaining the benefits, it endeavored to repudiate.

Mr. Justice Brandeis delivered the opinion:

"The obligation of a land-aided railway to carry the mail at a price fixed by Congress is a charge upon the property. The public lands were granted to Michigan to aid the construction of certain railways upon certain conditions. The legislature of Michigan could not dispose of the lands except in accordance with the terms of the grant. By the Act of February 14, 1857, it accepted the grant and enacted legislation to give legal effect to the conditions of it. Section 4 of the act is as follows: Said railroads shall be and forever remain public highways for the use of the government of the United States, free from toll or other charges upon the transportation of any property of the United States; and the United States mail shall be transported over said railroads, under the direction of the Postoffice Department, at such price as Congress may by law direct. * * *" The order of the board of control of May 1, 1873, directing the transfer of the land to the Port Huron & Lake Michigan Company, and the patent issued by the governor, were founded upon the authority of Section 11 of the act; and under date of May 30, 1873, the company accepted the lands with the burden they imposed. The railroad, whose owners and constructors accepted aid derived from these lands, became charged by operation of law with the burden of transporting the mails. The question whether that company would have accepted the land with its burdens if it had foreseen the invalidity of the title to the western lands is wholly immaterial. The burden attached upon the acceptance of any aid whatsoever, no matter how disproportionate to the cost of constructing the portion so aided."

Grand Trunk Western Railway Company v. U. S., 252 U. S. 112, 124, 125, 64 L. Ed. 484, 491.

II.

"The State Acts of 1923 and 1927 Do Not Exact a 'Toll' Within the Meaning of the Federal Aid and Highway Acts." (Appellee's Brief, p. 13.)

Under this caption the appellee fails to show that the said Motor Vehicle Fuel exactions are not "tolls", but declares the *Old Homestead Bakery v. Marsh,* 75 Cal. 247 had no bearing.

We refer to the excerpt of said case as found in our brief on pages 12, 13, 14 and 15. The decision was based upon the argument of U. S. Webb, Attorney General of the State representing the defendant Marsh, and who now represents the defendant (now appellee) Riley in the instant case. Mr. Webb claimed that the Old Homestead Bakery must pay the license under subdivision (b) of Sec. 77 of the Motor Vehicle Act, as they use electric motor propelled vehicles and this charge is collected for the privilege of using the public highways, and this charge is payable in advance to said use and it is a flat charge, because the owners or operators of gas motor vehicles must pay in advance said 2 cents on every gallon before they can use the public highways.

In the opinion we find "the legislature of 1923 passed an act establishing an entirely new system for the raising of revenues for said purpose, so far as gas and other fuel cars are concerned, by requiring, practically, the owners or operators of all such cars to pay to the state, in addition to nominal registration fees, two cents per gallon for all gas consumed in the operation thereof" (our brief, p. 13).

The said exactions are revenue measures. Said exactions are charges against the said owners or operators and not against the other consumers of gas who do not use the highways by gas cars. These exactions are not imposed upon sales of gasoline, generally, "but only when the commodity is sold for consumption in the operation of vehicles upon the highways. A charge so limited amounts to same thing, in substance, as a toll for the use of the highways" (see our brief, p. 22, in excerpt of opinion of the Justices of N. H., and also the citations found in our brief under III, p. 17, and V, p. 32.)

By such decision, as affirmed by the Supreme Court of California, the said owners or operators must pay a "toll" before they can use the highways by their gas cars.

The appellee simply states that under said caption the said State Acts do not exact a "toll" within the meaning of the Federal Acts, to-wit: *"That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds,"* and he cites a number of authorities which do not support his position.

Said decision in *Old Homestead Bakery v. Marsh* is binding upon this Court, and this Court is to determine whether the said Motor Fuel Acts, so construed by the State Courts, are in violation of the said Federal Aid Legislation prohibiting "tolls of all kinds," the 14th Amendment, and the California Constitution.

Hanover F. Ins. Co. v. Carr, 272 U. S. 179, 71 L. ed. 224.
See our original brief, p. 16.

We have cited many decisions of what is a "toll" and also the meaning of "free from toll," etc., in our original brief and also in this brief, and we refer to our original

brief on that question. When Congress enacted the Rural Post Road Act of 1916, it had before it the said decisions and many others dealing with the question of "tolls" and the meaning of "free from tolls," etc., and it adopted the provision prohibiting "tolls of all kinds" well knowing what it meant, and to so prevent any question added "of all kinds" to the word "tolls".

The Supreme Court of the United States had interpreted such term in many decisions, and Congress adopted such construction in the said Federal Legislation.

Latimer v. U. S., 223 U. S. 223, 56 L. ed. 526.

The said term "free from tolls, etc." was expressly interpreted by this Court and this Court announced that it could not disregard "the long established usage of legislative expression," and without doing violence to language. The Court cited Acts of Congress on the question of tolls.

Lake Superior R. R. Co. v. U. S., 3 Otto 442, 23 L. ed. 965.

(We cited this case in original brief with excerpts, see p. 36.)

The appellee in his brief under this caption practically admits that such exactions are "tolls," but the prohibition of the Federal Aid Legislation does not protect the appellants. We will call attention to a few of the decisions cited by the appellee.

Kane v. New Jersey and *Hendrick v. Maryland.*

We cited said cases with excerpts in original brief, pages 18, 19. Both of said cases were instituted many

years before the Rural Post Road Act of 1916. The plaintiffs were non-residents and relied upon the Commerce Clause. This Court held that they must pay for regulation and also in addition a reasonable amount for the use of the highways, a "toll."

Pierce Oil Corporation v. Hopkins, 282 Fed. 235, affirmed by this Court, 264 U. S. 137, 68 L. ed. 593. We set out not only excerpts from said two decisions, but also the decision of *Standard Oil Co. v. Brodie,* 153 Ark. 114, 239 S. W. 753. The appellee in his brief, pages 18, 19, cited said *Pierce Oil Corp. v. Hopkins,* cases to support the following argument, to-wit: "The only one whom the state makes responsible for the tax is the distributor;" again, "An Arkansas statute required all sellers of gasoline for use in motor vehicles to collect a tax of one cent a gallon, etc. * * *. The Federal Court held that the tax was not levied against the purchaser, but was an excise tax on the privilege of making sales of gasoline, etc." (282 Fed. 253, 255, found on appellee's brief on page 21.)

The State of Arkansas enacted a law, exacting a charge of one cent per gallon on such motor fuel which was used exclusively by motor vehicles on the public highways. The following excerpt of such case is set out herein:

> "On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highways, and the extent of the use is measured by the quantity of the fuel con-

sumed, and the tax is imposed according to the extent of the use as thus measured.

"If it had been intended merely to tax the gasoline or its use, it would have been wholly unnecessary to describe the character of the use or the place where it was to be used, and the fact that the lawmakers incorporated these elements in laying the basis of the taxation shows unmistakably that it was intended to impose a tax upon the use of the public highways by the method described. It is clear that the tax is not imposed on the seller nor upon the gasoline while in his hands, and this of itself makes it manifest that there was no intention to levy a tax upon the sale of gasoline nor upon the gasoline itself. * * * But, as we have already said, this is not a tax on gasoline, but on the use of the public highways of the vehicles mentioned and the case comes, therefore, within the doctrine announced by Judge Riddick in the Scruggs case, supra, that the tax on the article used does not constitute a tax on the article itself, for the privilege is not upon the article but upon the use of it on the public highway.

"It is, in effect, the use of the public highways that is taxed, and not the use of the article itself. * * *

"Our conclusion, therefore, is that, under a fair interpretation of the statute, it imposes, not a property tax, but a tax upon the privilege of using automobiles upon the public highways. * * *

"It is next contended that the due process clause of the Constitution of this State and of the United States is violated by the requirement laid upon the dealers in gasoline to collect and pay the tax. It must be remembered that the tax is not laid on the sale of the gasoline, nor upon the business of the dealer. The dealer is not required to pay the tax, but to collect it, keep and present an account thereof, and pay over to the county treasurer. * * *

"That principle is not ignored in the provisions of the statute now under consideration, for the dealer has ample opportunity to reimburse himself

in advance, by the collection of the tax before the commodity is delivered."

Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753.

Among other citations in the above case the Supreme Court of Arkansas cited and relied upon the Scruggs case, in which it is said:

"The license fee imposed is, then, not a tax upon property, but is in the nature of a toll for the use of the improved streets. In other words, it is the privilege of using vehicles on the improved streets, and not the vehicle itself, that is taxed."

Smith v. Scruggs, 79 Ark. 544; 69 S. W. 679.

The Circuit Court of Appeals also had occasion to pass upon the same Arkansas law, and we set out the following excerpt in the opinion:

"The claimed violations of the Fourteenth Amendment to the Constitution of the United States rests upon the assumptions that the tax is levied against the purchaser, and that the seller is required to pay the purchaser's tax, without benefit or reimbursement. The first inquiry is whether the seller does pay a tax which is levied against another. The Supreme Court of Arkansas, in the case heretofore cited, declared that the tax was not imposed upon the gasoline as property, nor upon the sale, nor upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the act upon the public highways. * * *

"It becomes necessary to ascertain the actual effect of the statute, whatever name or description has been applied to it by the State Supreme Court (Standard Oil Co. v. Graves, 249 U. S. 389, 394, 39 Sup. Ct. 320, 63 L. Ed. 662), in order to determine whether it violates the Constitution of the United States. It is doubtless true that the amount of the tax usually does fall finally upon the pur-

chaser, because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax. (Clark v. Titusville, 184 U. S. 329, 333, 22 Sup. Ct. 382, 46 L. Ed. 569.) It may also be conceded that what is ultimately gained by the purchaser for the amount of tax so included is the use of the highways for automotive vehicles propelled by gasoline."

Pierce Oil Corp. v. Hopkins, 282 Fed. (C. C. A.) 253, 255.

Such case reached this Supreme Court and the decree of the lower court was again affirmed and the following excerpt of the opinion of this Court was delivered by Mr. Justice Brandeis:

"The claim that the act violates the due process clause rests upon the argument that the tax levied is a privilege tax for the use of the highways by the purchasers; that the seller is required to pay the tax laid on the purchasers; that, unlike those cases where a bank is required to pay taxes assessed against stockholders or depositors (Citizens Nat. Bank v. Kentucky, 217 U. S. 443, 54 L. Ed. 832, 30 Sup. Ct. Rep. 532; Clement Nat. Bank v. Vermont, 231 U. S. 120, 58 L. Ed. 147, 34 Sup. Ct. Rep. 31), the seller is not afforded the means of reimbursing himself; and that, moreover, the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense. A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a state which has, under its constitution, * * * is not prevented by the due process clause from imposing incidental burden."

Pierce Oil Corp. v. Hopkins, 264 U. S. 137, 68 L. Ed. 593.

The above excerpt from *Pierce Oil Corp. v. Hopkins,* 282 Fed., on page 255 shows the Federal Court did not hold that the tax was an excise tax on the privilege of making sales of gasoline, but did hold "that the tax was not imposed upon gasoline as property, nor upon the sale, nor upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the act upon the public highways."

The excerpts from the decision of *Standard Oil Co. v. Brodie* and the decisions of *Pierce Oil Corp. v. Hopkins* in the Circuit Court of Appeal and in this Court show that *such tax is a "toll" for the privilege of using vehicles on the highways.*

The appellee cited on pages 21, 22 the case of *State v. Panhandle Oil Co.,* 147 Miss. 663. This case was taken to this Court and was reversed. *Panhandle Oil Co. v. Mississippi, 277* U. S. 218, 72 L. Ed. 857, ex rel Knox.

In the early days, the tolls were fixed by distances with different rates depending upon the capacity and weight of the vehicles, and the toll gatherers took the "tolls" and the travelers were compelled to stop at the designated places, but today travelers by motor vehicles only stop at the service stations after they have exhausted their motor fuel and pay the "tolls" in advance, for the distances they desire to travel, depending upon the capacity and weight of their motor cars. (R. 7.)

The appellee is aggrieved that the term "free from tolls of all kinds," is contained in the Federal Aid Legislature, and he asks this Court to change the meaning of said term, and the words thereof, which has been passed upon by this Court in many decisions. This Court recently had before it a case in which the appellant asked

this Court to change the meaning of words because of new conditions after the land-grant acts.

Mr. Justice Sutherland in delivering the opinion of the Court said:

> "It is said that railway postal cars originated after the passage of the land-grant acts. But it does not follow that such cars are not fairly within the meaning of those acts as essentially incident of transportation. The provision reaches into the future; and, while its meaning does not change, its application may well embrace new conditions and new instrumentalities which come within the scope of the terms employed. This is in accordance with the universal law of language. In a sense, words do not change their meaning; but the application of words grows with expansion of society."
>
> *Missouri P. R. Co. vs. U. S.*, 271 U. S. 603, 70 L. Ed. 1109.

III.

"The Federal Aid Act and the Federal Highway Act Have Not Been Violated." (Appellee's Brief, page 23.)

On page 23, the appellee contends that the term "free from tolls of all kinds" does not extend to occupational or privilege taxes, and also the appellants did not cite a single case that the Motor Vehicle Fuel Act of 1923 or 1927 imposes a "toll" contrary to the prohibition in the Federal Aid and Highways Act; he then cites a number of cases.

We say that the appellee had already made the same statement that "free from tolls of all kinds," and we refer to our former argument in this reply brief.

This Court again announced that:

> "The case, as the evidence shows, and it is not unnatural that any appropriate canon of construction should be laid hold of to justify a conclusion favorable to the respondents. But if the plain words of the statute are against such a conclusion, leaving no room for construction, the courts have no choice but follow it, without regard to the consequences."
>
> *Comm. of Immigration vs. Gottlieb,* 265 U. S. 310, 312, 68 L. Ed. 1031, 1033.

In our original brief, page 17, we had cited in the matter of Schuler, 167 Cal. 282, relating to the Motor Vehicle Act of 1913 and that the Supreme Court had followed the Ft. Smith vs. Scruggs and Kane vs. New Jersey in which cases the license taxes were held "tolls."

We call attention to the following case from California. The City of San Mateo had a right to license delivery wagons under Sec. 11 of Article XI, but such use of the streets of a city by delivery wagons of a business enterprise, as would be merely occasional and incidental to a business conducted elsewhere than within its boundaries, would not be the proper subject of taxation.

> "While the use of the streets may be regulated, the city has no power to convert them into toll roads and thus exact tribute from those who in the conduct of business elsewhere have occasion to use them solely as highways."
>
> *The Emporium vs. San Mateo,* 177 Cal. 622; *City of Madera vs. Black,* 181 Cal. 306.

We have called attention to the appellee by the complaint that the California Courts had interpreted the *Motor Fuel Act* of 1923 (R. 6), and said motor fuel acts are construed together in order to raise revenue in

the nature of compensation for the damage done to the highways by said motor cars, etc. (R. 6, 7.) We again called attention in our original brief and the appellee has not debated the questions in issue.

The Supreme Court of California has interpreted the Motor Fuel Acts and the Motor Vehicle Act, as being one law. (Our original brief, pages 12, 13, 14, 15.) We have answered the statement in such respect in our reply brief.

This Court is bound by such interpretation of these state laws, and it

> "must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."
>
> *Hanover F. Ins. Co. vs. Carr,* cited in our original brief, pages 16, 17 and in our reply brief.

It follows that this Court is only interested in the California laws, as interpreted by the Supreme Court of California. The following cases were cited by appellee:

Cunningham vs. Potts, Motor Liquid Fuel Tax of Washington. In the opinion, one judge, we find in appellee's brief on page 24, the following excerpt:

> "If an attempt were made to collect such a tax upon gas distributed and used in motor vehicles operated and intended to be operated exclusively upon federal highways, a different question would be presented."

In the instant case it is alleged and admitted by the motion to dismiss that

> "All the highways of the State of California are post roads, and the public highways of said State are covered by the said Acts, as aforesaid." (R. 3, 4.)

This case does not furnish much support of the statements of appellee.

Anthony vs. Kozer, Motor Fuel Tax of Oregon. The Oregon law is not similar to the California Motor Fuel Act. Further the Supreme Court of Oregon had interpreted said law and the District Court, one judge followed said decision.

The case was *Portland v. Kozer,* 108 Ore. 375, and excerpts from the opinion are found in the opinion of the District Court, but the appellee did not care to include any excerpt of such matter.

We set out the following from the opinion:

> "Defendant's theory is that the 'license tax' is an excise levied upon the dealers for the privilege of engaging in the business of selling and distributing motor fuel to owners and operators of motor vehicles, and is not, in legal sense, a toll imposed for the use of or privilege of using the rural post roads of the state.
>
> "The Supreme Court of the State has heretofore, in the case of Portland v. Kozer, et al., 108 Ore. 375, in a measure passed upon the question involved. This was a suit by the City of Portland to enjoin Kozer, the Secretary of State, from exacting the payment of the license tax from the City of Portland—in other words, privileged to buy its motor fuel from the dealers without being burdened with the license tax imposed upon them. The court was of the opinion that the statute in question did not provide for levying the tax upon the municipalities of the state, but against the seller or dealer prior to purchase of gasoline by the city, and therefore refused to relieve the city from the payment of such tax * * *.
>
> "The result of the decision was that the tax was against the dealer, and that the municipality was not exempt from paying the dealer's charges for

> motor vehicle fuel, although the price might have been so adjusted as to include or absorb the tax."

We now set out the following from the opinion of said Supreme Court:

> "We conclude that the statutes in question do not provide for levying the tax upon the municipalities of the state, but against the seller or dealer prior to the purchase of gasoline made by the city." (108 Ore. 385.)

In the instant case it is alleged in the complaint and admitted by the motion to dismiss that the appellants have paid in advance and must pay in advance before operating on Federal highways, and said exactions are not a part of the price of said fuel but are in addition to the purchase price, etc. (R. 7, 8).

Also the decision in *Old Homestead Bakery v. Marsh* which decided the owners or operators must pay said exactions and not the sellers or distributors.

Again the appellee has failed to support his statement in his brief.

Martine v. Kozer (Appellee's brief, page 27.) A License Motor Vehicle Law of Oregon. This case was based upon the police power of the state, and not for revenue.

Again the appellee has failed.

In the instant case the decisions of California cited by us show that not only the license fees, but also the gas exactions are revenue measures.

Smallwood v. Jeter. (Appellee's brief, page 28.) This action was an attack against the 5% law of Idaho compelling certain operators to pay for the privilege of doing business on the highways, and not a weight measure.

Sanger v. Lukens (Appellee's brief, page 28.) This action was similar to the Smallwood v. Jeter. One judge.

In both cases the courts held that the prohibition against tolls in the Federal Aid Legislation did not protect the plaintiffs.

In the instant case there is no issue of such kind, we are not endeavoring to use the public highways for business purposes, and the Motor Fuel Acts do not charge for business purposes.

Again the appellee has failed.

Liberty Highway Co. v. Michigan Public Utilities Commission. (Appellee's brief, page 28.) The Court issued an injunction against the Commission. One minor question was the charge of a small fee which was to be used for the cost of regulation under the police power; nothing about license fees at all.

The excerpt shows (pages 28, 29) that fact.

Again the appellee has failed.

State v. Oligney. (Appellee's brief, page 29.) A non-resident attacked the license law of Minnesota, in order to operate a truck for business purposes. Under the police power the Court held the license law was not in violation of the Federal Aid Legislation. The excerpt (page 29) shows that fact.

In the instant case the appellee will collect $32,000,000 this year at the cost of a few thousands from these motor fuel laws. Can any court hold that this is a reasonable charge, in addition to about $10,000,000 from the Motor Vehicle Law?

Again the appellee has failed.

Morris v. Duby. (Appellee's brief, page 29.) Again the decision was based entirely upon the police power

and was not based upon the provisions of "free from tolls of all kinds."

Again the appellee failed.

The appellee has set out on page 32 a purported Act of Congress. We will correct the same.

> "An Act to permit the granting of Federal aid in respect of certain roads and bridges.
>
> "Be it enacted by the Senate and House of Representatives, etc., That notwithstanding any provision of the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes,' approved July 11, 1916, or of the Federal Highway Act, the Secretary of Agriculture may extend, on the same basis and in the same manner as in the construction of any free bridge, Federal aid under such acts, in the construction of any toll bridge and approaches thereto." (The balance of appellee's excerpt.)

The appellee says "Suggestive that the intention of congress is as federal and state courts have declared it." Congress has declared that it will waive the provision "free from tolls of all kinds," but does not permit the state or any political subdivision to make any profit. Compare *U. S. v. Michigan,* 190 U. S. 379, cited in our original brief, page 38.

IV.

"The Federal Government Has Acquiesced in the Action of California and Other States." (Appellee's Brief, page 33.)

The appellee does not cite any decision to support the statements under this caption.

The same plea was made in the *Buck v. Kuykendall,* 276 U. S. 205, 69 L. Ed. 623, by the appellee.

The facts show that the Federal Government was protected by Section 10 of both the laws of 1923 and 1927, in which is found the following:

> "nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of government." (See appendix of appellee's brief, page 55, and pages 61, 62.)

It follows of course the government is not raising any objection. When the state enacted the Law of 1923, it enacted the *Motor Vehicle Act* of 1923 the (d) of Sec. 77, which provided that if the Motor Fuel Act was held unconstitutional, then the registration fees of motor vehicles were increased. (See appendix in our original brief, pages 10, 11.)

The appellants show that the appellee had collected many millions during the period from March 31, 1928, to July 1, 1928, at the rate of about $90,000 a day from these appellants, and that the appellee will continue to collect said exactions unless restrained, and the appellants have and will obstruct, hinder, impair and impede the unrestricted and vested passage, use and operation of said motor vehicle owners, etc. (R. 8.)

In 1923 the first Motor Fuel Act was passed, charging the owners or operators the 2-cent per gallon. In November, 1926, the people of the state defeated the attempt to increase (see our original brief, page 39), the exactions to 3 cents. Yet the legislature in 1927 in the face of such vote of the people, passed the law of 1927. For the year 1928 the state has received $32,000,000 from these exactions and at least $10,000,000 from registration fees and licenses (pp. 39, 40). No wonder the appellants and thousands of others have made up their

minds to stop such illegal practices. Prior to the adoption of the Federal Aid Legislation by the state, the public had no recourse to combat such exactions. As was said by this Court, "If the state laws furnish no remedy (in other words, if the charges are sanctioned by them), then, as before stated, it is for Congress, and not the United States Courts to regulate the matter, and provide a proper remedy." (Our original brief, pages 36, 37, 38, 39). Congress did provide a proper remedy and it is the duty of this Court to enforce said remedy under the Acts of Congress.

In the early days many states entered into the construction of works of improvements, canals, highways, railroads, banks, etc. Many of such states became bankrupted and repudiations were made. We call attention to a decision delivered by Judge Moore, in the case of *Oren ex rel. Barbour v. Pingree,* 120 Mich. 550, reciting such situation. The states have gone wild over the construction of highways with no safety valve, except such prohibition. The state is trustee for the public, as well as the Federal Government, and such public, to-wit, these appellants and many thousands of persons, demand relief.

This case is not instituted by "those persons and companies who operate vehicles over the highways for their personal gain." (Appellee's brief, p. 35). Just before this statement the appellee, page 34, cited section 15, article XIII of the Constitution showing that said class must pay a 4½ or 5% of their gross revenue. The appellee is always shifting his position.

On the same page 34, he cites the two cases based upon the Motor Vehicle Law of 1913, to-wit:

In the matter of Schuler, 167 Cal. 259, and

In the matter of Stork, 167 Cal. 294, that "the Supreme Court of California to impose an excise or privilege tax for the purpose of providing a fund for roads under the dominion of the state authorities in the nature of compensation for damage done to the roads by motor vehicles." In other words a "toll" and we had cited the Schuler case for the same purpose. We see no reason why he objects to the interpretation of the Motor Fuel Acts. Both laws constitute one law.

V.

"Appellants Have No Standing in Court." (Appellee's Brief, page 36.)

The appellee cites no decision to statements under such caption.

Because no one except the Federal Government and the State of California can object. Look on pages 32-41 in our original brief. The appellee cited the *Buck v. Kuykendall,* supra. Buck brought the action and not the United States; also the Cunningham case, the plaintiff's brought the action, and not the United States; also the cases of Martine, and Anthony, not the United States. Where did the Government get the money to pay said federal aid? Why, of course, from the appellants and other taxpayers all over the United States. Surely they have the right to enjoy the benefits of their own money, which was paid out for them by the Federal Government.

> "The questions before us are of high importance to the community, and are emphatically questions between the rights of the public and the powers of the corporation. The privilege of making this canal and of receiving tolls upon it, was granted by the

States without any compensation to the public but the convenience it was expected to afford. The States, as well as the United States, have contributed to the expense of its construction. And the court is called upon to decide whether the States who chartered this company have authorized it to enact any amount of toll it may think proper from their own citizens, as well as others, for the privilege of passing over it; or may, if such be its interest or policy, refuse altogether the permission to pass.

"In the opinion of the court the charters do not confer either of these powers upon the corporation, and we shall certify accordingly to the Circuit Court."

Perrine v. Chesapeake & Del. Canal Co., 9 How. 172, 13 L. Ed. 92.

This case was instituted under Section 24 the *Judicial Code*, especially under the Fourteenth clause, to-wit:

"Fourteenth—of all suits of law or equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity, secured by the Constitution of the United States, or any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

VI.

"The State Law Is Consistent With the Fourteenth Amendment." (Appellee's Brief, page 37.)

The appellee cites the four cases brought by the distributors, not the consumers, the *Cunningham* case and *Sanger v. Lukens.* Our position was presented in our original brief, pages 25-32.

The appellee did not notice the reasons of why the 14th Amendment protects the appellants, but on page

42 of his brief we find that he fears that the refunds, etc., will be held illegal. Why, because they offend the 14th Amendment, as well as the California Constitution.

An excerpt from the Supreme Court's decision of the Gas Law of Illinois, *Chicago Motor Club v. Kinney,* cited in our original brief on that question on page 31:

> "We come now to the consideration of the validity of section 10 of the Motor Fuel Tax Act, which is challenged on the ground that it makes a gift of public funds to 'any person who uses motor fuel (upon which the license tax imposed by this act has been paid) for any purpose other than operating a motor vehicle upon the public highways of the state.' It is elementary that taxes can be levied for purposes only (1 Cooley on Taxation (4th Ed.) Sec. 174; Citizen's Savings & Loan Ass'n v. Topeka, 20 Wall. 655, 22 L. ed. 455; Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39), and that public funds can not be appropriated to any private purpose (Washingtonian Home v. City of Chicago, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798; Deering & Co. v. Peterson, 75 Minn. 118, 77 N. W. 568). It is a violation of the due process of law clause of the national and state Constitutions to take a citizen's money from him under the guise of taxes for any other than a public purpose. Robbins v. Kadyk, 312 Ill. 290, 143 N. E. 863; Green v. Frazier, 253 U. S. 233, 4 S. Ct. 499, 64 L. ed. 878; Water Co. v. Wade, 59 N. J. Law, 78, 35 A. 4."

VII.

"The State Law Is Consistent With the State Constitution." (Appellee's Brief, page 37.)

In our original brief we debated the said refund, etc., as being in violation of the Fourteenth Amendment, from pages 25-32, and also being in violation of the Constitution of California, from pages 41-44. The only defense

is that all of the questioned provisions could be eliminated without nullifying the law in its entirety. Again the appellee did not cite any authority on such matter. We submit that the interpretation of the Courts in the Old Homestead Bakery Case, supra, that the sole purpose was to raise a fund from the owners or operators using their motor cars and not to raise a fund from all the consumers of motor fuel, then, if said refund is held illegal and all consumers must pay, the entire purpose has been destroyed.

In addition to the decisions in our original brief we submit the following:

> "It is well established that a statute may be in part constitutional, and in part unconstitutional, and, if the parts are wholly independent of each other, that which is unconstitutional will be rejected; but as well said in Poindexter v. Greenhow, 114 U. S. 305:
>
> > 'These are cases where the parts are so distinctly separable that each can stand alone, and where the Court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact.' "

The same court also said in *Spraigue v. Thompson,* 118 U. S. 94, where it was sought to apply the rule to certain illegal exceptions in a statute of the state of Georgia:

> "The inseparable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia, the statute is made to enact what confessedly the Legislature never meant. It forces upon the statute a positive operation beyond

the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions." See also, Colleys Constitutional Limitations, 209-12; Warren v. Charlestown, 2 Gay, 84.)

In re Wong Haue, 108 Cal. 680, 683.

To the same effect:

Robert v. Police Court, 148 Cal. 131.

"In other words, the situation is simply that the Legislature has not passed a general law which will operate uniformly, as it was required by the Constitution to do. For the courts to eliminate the exception and thus make the statute operate uniformly would be to hold that Legislature had passed a statute which it had not in fact passed and would, in effect, be for the courts themselves to legislate. To put it concretely, for the courts to strike out from the California Irrigation Act the exception of the counties of Los Angeles and San Bernardino, for that is what the exception really is, would be for the courts themselves to extend the operation of the act to those counties, although the Legislature has expressly said that they shall not come within its operation. Upon this point the present case comes directly within the authority of Spraigue v. Thompson, 118 U. S. 90, (30 L. ed. 115, 6 Sup. Ct. Rep. 988, see also, Rose's U. S. Notes.)"

Mordecai v. Board of Supervisors, 183 Cal. 434, 443.

To the same effect:

"Notwithstanding the provisions of Grain Future Trading Act, Aug. 24, 1921, Sec. 11, that if any provision therein is unconstitutional, the remainder of the act shall not be effected thereby, the invalid tax imposed by Section 4, of the act is so interwoven with act contained in Sections 5 and 6, that they cannot be separated without restraining the act, which is legislative work beyond the power and function of the court, so that such interwoven regulating

sections are invalid, though there are other sections, etc., which may be saved by Section 11."

Hill v. Wallace, 259 U. S. 44, 66 L. ed. 839.

To the same effect:

Meyer v. Wells, Fargo & Co., 223 U. S. 298, 56 L. Ed. 445.

The Illinois Court in its opinion said in the *Chicago Motor Club,* supra:

"Such an act is not the act that was passed by the General Assembly, and it is not evident that the act would not have been passed without Sections 6 and 10. Where the different objects of an act are so dependent upon or so mutually connected with each other in meaning or as conditions, considerations, or compensations for each other that it can not be presumed the Legislature would have enacted the provisions designed to secure one of the objects without the provisions of the other, the invalidity of the latter renders the whole act void. People v. Martin, 178 Ill. 611, 53 N. E. 309; Springfield Gas & Electric Co. v. City of Springfield, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679; Cooley on Const. Sim. (7th ed.) p. 246."

VIII.

"Injunction Relief Should Be Denied." (Appellee's Brief, page 45.)

The appellee cited no authority for the statements under this caption.

We refer to our original brief, and will set out an excerpt from one of the cases cited by us:

"It was charged that such action was a denial to the railroad companies of the equal protection of the laws, in violation of the Fourteenth Amendment.

The complainants asserted their right to relief in equity by injunction, because if the executive council certified their assessments, and distributed them to all the counties through which the railways ran, it would entail on the companies a multiplicity of suits to vindicate their constitutional rights. Complainant moved for temporary injunction under Section 266, of the Judicial Code. The Court, consisting of a circuit judge and two district judges, on the evidence adduced, found that it did not disclose intentional discrimination by the state taxing tribunals, and denied the motion. * * *

"Jurisdiction in the Rock Island case depends on the averment that the attempted assessment of complainant's railroad property in Iowa, complained of, was at a rate and upon a basis greater than the assessment of other property of the same class subjected to taxation in Iowa, and that the suit arises under the Fourteenth Amendment to the Federal Constitution forbidding any state to deprive any person of his property without due process of law, or to deny him the equal protection of the laws. We think this averment, in view of the allegations of the bill, invoked a substantial controversy under the Federal Constitution, and gave the district court jurisdiction. Its jurisdiction thus established gave the district court the authority to determine all questions involved, including questions of state law, irrespective of the disposition of the Federal question; and as the relief to which the complainant might be entitled would be the same as that which should be allowed him by the Federal Court upon a construction of the state Constitution and laws such as he contends for, the question whether the acts complained of violated the Federal Constitution need not be decided." (Citations.) "It follows, therefore, that in both the cases under consideration, the district court has jurisdiction to consider and decide whether the complainants in these cases are so injured by a violation of the State Constitution and laws in the taxation of their property as to entitle them to the

equitable remedy of injunction against the taxing officials made defendants."

Chicago Great Western R. Co. v. Kendall, 266 U. S. 96, 97, 69 L. ed. 188, 189.

In Conclusion.

We submit that the exactions are "tolls", being charges for the privilege of using the improved highways by motor cars by the owners and operators; all highways outside the limits of municipalities are constructed or reconstructed by Federal aid; all of the money collected is expended on the Federal aided highways; 40 per cent of the money is collected from the use of Federal aided highways, the balance, 60%, is collected from the use of the streets within the limits of the municipalities; said 40% is collected in violation of the Federal Aid Legislation; the 60% is collected illegally, being exacted for the use of said streets, and no portion of said 60% is expended in the maintenance or repair of said streets, but all of said 60% is expended on the said Federal aided highways, and the owners and operators pay a "toll" without any benefit, as all of said streets are constructed or reconstructed and maintained and repaired at the cost of the taxpayers of said cities, including the owners and operators; all of said 100% is collected illegally by reason of the provisions of said laws granting refunds, one per cent for future loss and handling, and the retention of all moneys collected by the distributors for 45 days; said laws and the acts of the appellee enforcing the same are illegal and unconstitutional, being contrary to and in violation of the Federal Aid Legislation of the 14th Amendment and the Constitution of the State of California.

The questions presented herein have never been passed upon by this Court where the rights of owners and operators are involved.

Respectfully submitted,

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